UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE LORAZEPAM & CLORAZEPATE ANTITRUST LITIGATION	**MDL Docket No. 1290 (TFH)** **Misc. No. 99ms276 (TFH)**
This Opinion applies to: **STATE OF CONNECTICUT, et al., Plaintiffs,** **v.** **MYLAN LABORATORIES, INC. et al., Defendants.** **and** **FEDERAL TRADE COMMISSION, Plaintiff,** **v.** **MYLAN LABORATORIES, INC. et al., Defendants.**	

MEMORANDUM OPINION Re: Puerto Rico Intervention

Pending before the Court is a motion to intervene by the Commonwealth of Puerto Rico pursuant to Federal Rule of Civil Procedure 24(a) and (b), which is opposed by the Plaintiff States and the Federal Trade Commission ("FTC"). Upon careful consideration of the motion, the opposition and reply thereto, the representations made by the parties at the hearing held on November 29, 2001, and the entire record herein, the Court will deny the motion to intervene.

I. DISCUSSION

Puerto Rico first seeks intervention of right under Federal Rule of Civil Procedure 24(a)(2). The Federal Rules authorize intervention of right as follows:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The D.C. Circuit has established four requirements for parties who wish to intervene under Rule 24(a)(2): "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." S.E.C. v. Prudential Securities, Inc., 136 F.3d 153, 156 (D.C. Cir. 1998) (citing Williams & Humbert, Ltd. v. W. & H. Trade Marks (Jersey), Ltd., 840 F.2d 72, 74 (D.C. Cir. 1988)). In addressing a motion to intervene in class action suits, the Court must strike a "balance between keeping class litigation manageable and allowing affected parties to be adequately heard . . . ." Twelve John Does v. District of Columbia, 117 F.3d 571 (D.C. Cir. 1997).

The Court will deny Puerto Rico's motion for intervention as of right. As an initial matter, the motion is untimely. Puerto Rico attempts to justify this eleventh-hour motion, made on the eve of the final approval fairness hearing, by claiming that it first learned on November 8, 2001 that it was excluded from the final settlement proposal at Mylan's request and that there were approximately 1,300 claimants from Puerto Rico, who will not recover money from this

settlement. Puerto Rico Mot. at 5; Puerto Rico Reply at 1-2; Aff. of Judith Martinez Fortier ¶¶ 4-5 (attached to Reply). Puerto Rico feels particularly aggrieved by the fact that when the FTC, Plaintiff States, and the defendants reached an agreement in August 2000, they asked eighteen other states to join, but excluded Puerto Rico. As soon as it learned of this fact on November 8, 2001, it filed this motion, which in its view is thus timely. The Plaintiff States concede that Puerto Rico "was not specifically asked to become a party at the time that the other 18 states were joining," 11/29/01 Tr. at 13, but highlight the fact that Puerto Rico "specifically declined to join the litigation at the Plaintiff States' invitation on at least three separate occasions, December, 1998 (when the Complaint was filed), February, 1999 (when the Amended Complaint was filed), and May, 1999 (when the Second Amended Complaint was filed)." FTC/States Opp'n at 4. In addition, the Plaintiff States note, Puerto Rico is a member of the National Association of Attorney Generals, which has discussed this matter "repeatedly at every . . . function since the filing of this case." 11/29/01 Tr. at 13. The Plaintiff States also point to the extensive notice of settlement provided in this case and the extensive press coverage given to the case throughout its duration. Puerto Rico has rebutted none of these points. Given the length of this litigation, spanning nearly three years, the extensive press coverage and wide-reaching notice provided as part of the settlement process, the opportunities to join this action previously provided to, and declined by, Puerto Rico, and the obvious prejudice the other parties will suffer from the delay that would result from permitting intervention at this late stage, the Court cannot find this motion to be timely. See, e.g., Scardelletti v. Debarr, 265 F.3d 195, 202-03 (4th Cir. July 27, 2001) (considering how far the suit has progressed, the prejudice that delay might cause other parties, and the reason for the tardiness in moving to intervene); Stewart v. Rubin, 948 F. Supp. 1077, 1103 (D.D.C. 1996) (considering the length of time the intervenor knew or should have known of

her interest in the case; the prejudice to the original parties resulting from the intervenor's delay; the prejudice, if any, to the intervenor if the motion is denied; and any unusual circumstances in determining timeliness).

Neither can the Court find a legally protected interest that will be impaired by this action. Puerto Rico postulates that the money recovered under the settlement "may be" the only just compensation to be received by the consumers; thus, it "must be assured that the present settlement cannot put at risk the defendant's financial status in such a manner as to compromise any possible future recovery that the intervenors might have against the defendants." Puerto Rico Mot. at 6. It also expresses fear that prosecuting its own action independently will be economically unfeasible. Puerto Rico Reply at 6. The Plaintiff States counter that Puerto Rico's "rights to pursue its claims against Defendants remain entirely unimpaired as a result [of] the Plaintiff States' and the FTC's settlement," that Puerto Rico has presented no credible evidence that the defendants will be financially compromised as a result of this settlement, and that mere allegations of strategic disadvantage do not satisfy the requirements of Rule 24(a). FTC/States Opp'n at 5-6. The Court agrees. Puerto Rico has totally failed to substantiate its speculation about the defendants financial health, and although the Court acknowledges the financial burden that Puerto Rico will inevitably bear in having to litigate its claims independently, any strategic disadvantage it now suffers therefrom stems solely from *its own choice* not to join the Plaintiff States on at least three prior occasions. Most important, Puerto Rico has made absolutely no showing of "plain legal prejudice" to its rights. In re Vitamins Antitrust Litig., No. 99-197, 1999 WL 1335318, at *3 (D.D.C. Nov. 23, 1999) ("The issue of intervention as of right in this case ultimately turns on the potential intervenors' argument that they would suffer an 'impairment of

interest' if not allowed to intervene. To establish this 'impairment of interest,' these plaintiffs must show that the settlement proposal would cause them 'plain legal prejudice.' ") (quoting Hirshon v. Republic of Bolivia, 979 F. Supp. 908, 912 (D.D.C. 1997)). That is, Puerto Rico has failed to demonstrate in any way that its own legal rights, or those of its citizens, will be impaired by this settlement; it remains free to pursue its own legal claims against the defendants. Puerto Rico therefore has made an insufficient showing for the Court to find any impairment of interest.

Puerto Rico also seeks permissive intervention under Federal Rule of Civil Procedure 24(b)(2). Rule 24(b)(2) provides:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(2). "As its name would suggest, permissive intervention is an inherently discretionary enterprise." E.E.O.C. v. National Children's Ctr., Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998) (citing Hodgson v. United Mine Workers of America, 473 F.2d 118, 125 n.36 (D.C. Cir. 1972)). In exercising this discretion, the Court considers whether the putative intervenors have shown: "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." Id. Of course, the Court also "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2).

For the reasons stated above, the Court finds the motion untimely and will accordingly

deny Puerto Rico's request for permissive intervention. See In re: Discovery Zone Securities Litig., 181 F.R.D. 582, 599 (N.D. Ill. 1998) ("The timeliness analysis is substantively the same under both subsections of Rule 24."). As the Plaintiff States claim, the original parties would be unduly prejudiced by intervention at this late stage. Final approval of the settlement, and thus the relief that will be provided to the consumers and state agencies who prosecuted this action, would be significantly delayed by intervention because the parties would have to litigate or negotiate a new settlement to include Puerto Rico. The Court is sympathetic with the 1,300 Puerto Rico claimants. But in light of the fact that Puerto Rico chose not to join this litigation on three prior occasions and that it fully retains its legal right to prosecute its own action against the defendants, however, the Court cannot justify the prejudice to the thousands of other claimants that would result from intervention at this eleventh hour.

II. CONCLUSION

For the foregoing reasons, the Court will deny Puerto Rico's motion to intervene. An appropriate order will accompany this Memorandum Opinion.

January 31st, 2002

Thomas F. Hogan
Chief Judge

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ORDER Re: Puerto Rico Intervention

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Puerto Rico's motion to intervene [#179] is **DENIED**.

SO ORDERED.

January 31, 2002

Thomas F. Hogan
Chief Judge

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